BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

LARENE E. WENTZ	)	
Claimant	)	
V.	)	
	)	
ALLIED OIL & GAS SERVICES	)	Docket No. 1,075,218
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY CO. OF CONNECTICUT	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), through William L. Townsley, request review of Administrative Law Judge Pamela J. Fuller's January 7, 2016 preliminary hearing Order. D. Shane Bangerter appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the January 5, 2016 preliminary hearing transcript and exhibits thereto, the January 7, 2016 deposition transcript of Terry Heinrich and exhibits thereto, and all pleadings in the administrative file.

ISSUES

Claimant testified he injured his shoulders on June 10, 2015. A doctor recommended bilateral shoulder surgery.

Respondent contends claimant did not prove his injuries arose out of and in the course of his employment, including that his accident was the prevailing factor in his alleged injuries, medical condition and disability. Respondent argues claimant had preexisting shoulder problems and the medical evidence shows his injuries did not arise out of the asserted work-related accident. Respondent argues claimant may have injured his shoulders by using a wheelchair after his asserted accident. Respondent also argues claimant reported only a right shoulder injury, but did not provide timely notice of a left shoulder injury. Claimant maintains the Order should be affirmed.

The issues are: (1) did claimant provide timely notice of his injuries and (2) did claimant's injuries arise out of and in the course of his employment, including whether his accident was the prevailing factor in causing his injuries and medical condition?

FINDINGS OF FACT

Respondent performs cement work on oil rigs and it has five camps in Kansas. Claimant has worked for respondent for seven or eight years as a truck driver and cementer. His job duties include heavy lifting, pipe wrenching and overhead work.

On June 10, 2015, claimant was unscrewing a large mixing hopper from a mixing bowl. Claimant testified the threads on the hopper were worn out and he repeatedly tried to disassemble the hopper from the bowl. After his fourth try, claimant thought he had the hopper unscrewed and he tried to "yank it out" with both arms, but the hopper was still attached.[1] He felt pain in his shoulders and testified he immediately advised Paul Beaver, the on-site supervisor, about his shoulder injuries.

Claimant testified he contacted Terry Heinrich, respondent's district manager, the next day and told Mr. Heinrich he injured both shoulders at work. According to claimant, Mr. Heinrich offered him medical treatment, but he declined, telling Mr. Heinrich he "thought it was just a sprain."[2] That evening, claimant did not feel well, but figured his injuries would heal over time, especially because he was starting Family Medical Leave Act (FMLA) leave five days later for an unrelated foot condition requiring surgery. Claimant continued to work the rest of the week, but testified coworkers assisted with heavy lifting.

Mr. Heinrich testified claimant called him around 5:00 p.m. on June 11, and told him he had hurt his "shoulders" the day before, which prompted Mr. Heinrich to "chew him out" because neither claimant nor Mr. Beaver immediately informed Mr. Heinrich about what had happened.[3] Mr. Heinrich testified Mr. Beaver told him he forgot to relay the information about claimant's injury. Mr. Heinrich denied offering claimant medical treatment and testified claimant did not ask for medical treatment on June 11.

After indicating claimant reported injuring his "shoulders," Mr. Heinrich's deposition transcript further reads:

> Q. Okay. So on June 11th then you talked to Mr. Wentz, and did he tell you that he'd injured his left shoulder, right shoulder, or both shoulders?
>
> A. I'm sure it was the right shoulder.
>
> Q. All right. And so what did you do after he told you he'd had an injury to his right shoulder?

---

[1] P.H. Trans. at 4.

[2] *Id*. at 4-5.

[3] Heinrich Depo. at 7.

> A. Well, I believe he was getting ready to go on - - no, he wasn't, either. He told me it wasn't hurting all that bad is what he told me and - - but he said that he was going to go home and take some cold medicine 'cause he thought he was getting a cold. He thought maybe that his shoulders were hurting because of the cold. He went home and took the cold medicine, and he said he slept real good that night, woke up the next morning, his shoulders didn't hurt, and he just continued working.
>
> . . .
>
> Q. And on [June 12] he told you it was doing better, or did you ask him about it specifically? What happened there?
>
> A. No, I asked him how his shoulders were doing, and that's when he told me he took the cold medicine the night before and he slept real good and he said his shoulders weren't bothering him any that morning.[4]

Mr. Heinrich testified claimant said he did not contact respondent's medical service provider and claimant performed five more jobs the rest of the week. Mr. Heinrich asked claimant's coworkers if they knew whether claimant was hurting between June 11 and June 16 and they told him claimant worked like normal and never complained about anything hurting. A few days after claimant's accident, Mr. Heinrich checked the hopper and "had no problem whatsoever racking that hopper up . . ."[5] and indicated respondent is still using the same hopper.

After having foot surgery on June 19, 2015, claimant went on vacation to California. While on his trip, claimant's walking was limited to going from a car to a wheelchair or power chair. Upon his return on or around July 14, 2015, he contacted Mr. Heinrich and requested medical treatment because his bilateral shoulder symptoms had not improved.

Mr. Heinrich confirmed claimant contacted him sometime in mid-July 2015 and requested medical treatment for both shoulders. Mr. Heinrich reported claimant's injuries to respondent's safety manager, who instructed him to schedule a doctor's appointment.

On July 16, 2015, claimant saw Kyle Hodges, APRN-C. Mr. Heinrich attended this appointment because it was respondent's policy for him to attend appointments for an employee's work-related injury. The associated record states the reason for the appointment was "WCK hurt bil shoulders at work 06/10/2015."[6] After examining claimant, Mr. Hodges ordered physical therapy.

---

[4] *Id*. at 8-10; see also pp. 20-22, 26-28.

[5] *Id*. at 12.

[6] P.H. Trans., Cl. Ex. 2 at 1.

On August 19, 2015, claimant returned to Mr. Hodges reporting little improvement with physical therapy. Mr. Hodges recommended MRIs of both shoulders.

Claimant's right shoulder MRI showed questionable prior surgical intervention;[7] a full-thickness tear supraspinatus superimposed on a partial intrasubstance tear or tendinosis; partial intrasubstance tears or severe tendinosis of the subscapularis, a partial intrasubstance tear of the infraspinatus and long head biceps; degenerative changes of the acromioclavicular and glenohumeral joints; and a small amount of subacromial and subdeltoid bursal fluid.

The left shoulder MRI showed a full-thickness supraspinatus tear superimposed on tendinosis or a partial intrasubstance tear with mild muscle atrophy; degenerative changes of the acromioclavicular and glenohumeral joints; and potential adhesive capsulitis.

Thereafter, claimant was referred to Vivek Sharma, M.D., an orthopedic surgeon. On September 1, 2015, Dr. Sharma evaluated claimant and reviewed the MRIs. On exam, Dr. Sharma found that claimant had weakness and mildly restricted shoulder movement. Dr. Sharma diagnosed claimant with bilateral shoulder rotator cuff tears, with the left shoulder being worse clinically. Claimant also had labral tears. Dr. Sharma recommended bilateral shoulder surgeries and continuing physical therapy. Claimant was placed on light duty restrictions.

On September 11, 2015, respondent terminated claimant's employment after his FMLA leave concerning his foot had expired and he did not return to work. Claimant had a full release regarding his foot, but was still on restrictions from Dr. Sharma for his shoulders. Claimant also testified he was terminated because he could not return to work on account of his injured shoulders.

At respondent's request, Jeffrey Lieberman, M.D., performed an independent radiology review of the MRIs on September 23, 2015. For claimant's right shoulder, Dr. Lieberman stated the MRI findings were consistent with a full thickness tear of the supraspinatus tendon, in addition to tendinosis. There was some retraction/atrophy of the supraspinatus muscle of indeterminate age. Dr. Lieberman noted the MRI was consistent with post-surgical changes. Dr. Lieberman noted claimant likely had a mild sprain of his infraspinatus muscle/tendon and an intersubstance tear of the long head of his biceps tendon, ages uncertain. Dr. Lieberman found degenerative changes in claimant's acromioclavicular and glenohumeral joints which were most likely not entirely related to the reported injury. Dr. Lieberman believed claimant's glenoid labrum likely had degenerative changes and fraying (which would not be work related), but less likely there could be a labral tear (which would possibly be related to claimant's reported injury).

---

[7] Claimant testified he had a prior right rotator cuff repair in 1996 or 1997.

For claimant's left shoulder MRI, Dr. Lieberman found a full thickness tear of the supraspinatus tendon with coexistent tendinosis and also a partial thickness tear of the infraspinatus tendon. The age of the tears was uncertain, but Dr. Lieberman indicated the tears could be related to the reported injury. Dr. Lieberman also noted claimant had signal alteration in the scapula that could be related to fatty marrow (and not work related) or the possibility of a bone bruise/contusion (which could be related to claimant's reported injury). Moreover, claimant likely had degeneration and fraying in his labrum, most likely not related to his June 2015 injury, as well as degenerative change to his acromioclavicular joint that was likely not entirely related to his work injury.

The January 7, 2016 Order states:

> The respondent argues that the claimant failed to give notice as to a left shoulder injury. The claimant testified that he gave notice of his accident and injury to both shoulders. Mr. Heinrich initially stated that on the 11th, the claimant notified him that he had hurt his shoulders the day prior. Later in his testimony, he indicated that the claimant told him of a right shoulder injury and he didn't find out about the left shoulder until July. Mr. Heinrich accompanied him to his doctor appointment on July 16, 2015. The medical records provided from that visit states under "Reason for Appointment", 1. WCK hurt bil shoulders at work 06/10/2015. The Respondent authorized that appointment as well as the recommended therapy. It is found that the claimant did give notice of his accident and injury and even specifically, injury to the left shoulder.
>
> Based on the evidence presented, it is found that the claimant did meet with personal injury by accident arising out of and in the course of his employment on June 10, 2015. That the reported injury is the prevailing factor in the claimant's need for bilateral shoulder surgery.
>
> Therefore, the claimant's request for medical treatment to his bilateral upper extremities should be and the same is hereby ordered to be provided by the respondent and its insurance carrier.[8]

Respondent appealed.

PRINCIPLES OF LAW

K.S.A. 2014 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2011 Supp. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

---

[8] ALJ Order at 3.

K.S.A. 2014 Supp. 44-508 states in part:

(d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2014 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(c) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

. . .

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) The employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

Respondent had notice of claimant's bilateral shoulder injuries.

Regardless of the conflicting testimony between claimant and Mr. Heinrich, claimant testified he told his onsite supervisor, Paul Beaver, about injuring his shoulders the very day of his accident. Such evidence is sufficient to establish notice as to both shoulder injuries. As noted by the judge, Mr. Heinrich gave inconsistent testimony – first that claimant told him about bilateral shoulder injuries the day after the accident, but later that he was only told about claimant's right shoulder. Impliedly, the judge did not believe Mr. Heinrich's testimony. Claimant gave notice of both injured shoulders to Mr. Heinrich.

Claimant's injuries arose out of and in the course of his employment, including that his accident was the prevailing factor in his injuries, medical condition and disability.

Claimant testified he hurt his shoulders from lifting while at work. His testimony is sufficient to meet his burden of proof. Other factors may be in play, but the prevailing factor in causation was his work accident. This Board Member agrees with the judge that claimant's accident arose out of and in the course of his employment, including that his accident was the prevailing factor in his need for shoulder surgeries.

Respondent points to the facts that claimant initially believed that he had shoulder sprains that did not require medical treatment and would heal on their own and that he was able to keep working for five days after his accident. These concerns do not detract from the judge's findings that compensable injuries occurred. The theory that claimant's shoulder injuries might have been due to him overusing his upper extremities after being in a wheelchair or power chair following his foot surgery does not have much evidentiary support.

Claimant has some degree of preexisting degeneration in both shoulders and he had a temporally remote right shoulder surgery. The presence of a preexisting condition does not automatically equate to non-compensability. The evidence does not establish claimant had an aggravation of a preexisting condition or that his injury "solely" aggravated his preexisting condition.

Dr. Lieberman basically stated that some of the defects in claimant's shoulders were likely degenerative and some defects might be due to the work accident. The doctor's opinion on causation is highly summarized as a lukewarm "maybe." As noted in claimant's brief, Dr. Lieberman's report "neither supports nor controverts the evidence"[9] suggesting the accident caused claimant's injuries.

[9] Claimant's Brief at 8.

CONCLUSIONS

Respondent had timely notice of claimant's bilateral shoulder injuries. Claimant's injuries arose out of and in the course of his employment, including that his work accident was the prevailing factor in his injuries, medical condition and disability.

WHEREFORE, this Board Member affirms the January 7, 2016 Order.[10]

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

c: D. Shane Bangerter
shane@rbr3.com

William L. Townsley
wtownsley@fleeson.com
pwilson@fleeson.com

Honorable Pamela J. Fuller

[10] By statute, the above preliminary hearing findings and conclusions are neither final nor binding because they may be modified upon a full hearing of the claim. This review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.